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No. 85-2079

In the Supreme Court of the United States

OCTOBER TERM, 1986

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL., PETITIONERS

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132 and 1145, over an action by the trustees of a multiemployer employee benefit plan to collect contributions from a delinquent employer, where the employer's alleged obligation to make contributions arises from its duty under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), to refrain from unilaterally changing terms and conditions of employment during post-contract-expiration collective bargaining.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

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INTEREST OF THE UNITED STATES

Several agencies of the United States have a substantial interest in the proper resolution of this case. The Secretary of Labor enforces the fiduciary responsibility provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III), 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, which have been interpreted to require trustees of multiemployer employee benefit plans to act diligently and systematically to collect delinquent contributions owed to such plans; the Secretary thus has a strong, albeit indirect, interest in ensuring that plan trustees have an effective mechanism for collecting such delinquent contributions, especially since the Secretary himself lacks standing under ERISA to file collection suits. The Pension Benefit Guaranty Corporation (PBGC) ad-

ministers the plan termination insurance program established by Title IV of ERISA, a program under which PBGC assumes responsibility for paying pension benefits to the participants and beneficiaries of terminated plans that are inadequately funded; PBGC therefore has a strong interest in assuring that plan trustees can and do collect all required employer contributions. Finally, the National Labor Relations Board (NLRB) administers the unfair labor practice provisions of the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. III) 151 *et seq.*, which have been interpreted to prohibit an employer from unilaterally changing terms and conditions of employment during post-contract-expiration collective bargaining; the NLRB has an interest both in preserving the viability of its established procedures for resolving unfair labor practice charges and in avoiding excessive entanglement in collection disputes between employee benefit plans and employers. This Court invited the Solicitor General to express the views of the United States at the petition stage of this case.

STATEMENT

1. Petitioners are multiemployer employee benefit plans (Pet. 2). They were established by collective bargaining agreements and trust agreements between the Northern California District Council of Laborers and certain multiemployer bargaining associations representing construction industry employers in Northern California, and between the District Council of Plasterers and Cement Masons of Northern California and the same multiemployer associations (*ibid.*). From at least 1980 to 1983, respondent, Advanced Lightweight Concrete Company, Inc., was a member of one of these multiemployer bargaining associations, Associated General Contractors of California (AGC), and thus was a party to AGC's collective bargaining agreements with the two unions (*id.* at 2-3; Pet. App. A2-A3). Those agreements required respondent to make specified monthly contributions to

petitioners for each hour that its covered employees worked and to submit its books and records for audit upon petitioners' request (Pet. 2-3; Pet. App. A4).

By letter dated April 1, 1983, respondent notified the unions that it was withdrawing bargaining authority from AGC (Pet. 3; Pet. App. A4). Respondent indicated that it was ready to negotiate independently with the unions (*id.* at A4-A5; Pet. 3), but that it would not be bound by AGC's master agreements, or any of its successor agreements, after June 15, 1983, the expiration date of the extant agreements (Pet. App. A4). While the subsequent bargaining history between respondent and the unions is disputed (*id.* at A5 & n.1), it is clear that respondent did not enter into any new collective bargaining agreements with the unions, ceased making contributions to petitioners on June 15, 1983, and refused to permit petitioners to audit its books and records for the period after June 15, 1983 (*id.* at A5-A7 & n.2). In November 1983, the Regional Director of the National Labor Relations Board (NLRB) refused to issue a complaint based on a charge by one of the unions that respondent had failed to bargain in good faith (*id.* at A5 n.1).

2. In December 1983, petitioners filed suit against respondent in the United States District Court for the Northern District of California, seeking to collect unpaid contributions for the period after June 15, 1983, while post-contract expiration negotiations were pending (Pet. App. A6).[1] Petitioners alleged, inter alia, that respondent was bound under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), to honor during that period the contribution obligations established by the expired collective bargaining agreements, and that

[1] In March and April 1984, petitioners filed separate suits alleging that respondent had failed to make its books and records available for audit as required by the collective bargaining agreements. These suits were consolidated with this action (Pet. App. A6-A7).

the court had jurisdiction under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, and Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132, 1145, to enforce this obligation (Pet. App. A6-A7; Pet. 3). Respondent answered, inter alia, that any obligation it might have under the NLRA was not within the jurisdiction of the district court and that, in any event, its negotiations with the unions were at "impasse" and it therefore had no NLRA-based contribution obligation (Br. in Opp. 2 n.1, 3). The court granted summary judgment for respondent (Pet. App. A7-A8; Pet. App. B).

3. The court of appeals affirmed on the ground that the district court had no jurisdiction under either Section 301 or ERISA (Pet. App. A1-A36). It first noted that "an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the [NLRA]" (Pet. App. A9-A10). But, it added, "a collective bargaining agreement does not 'survive' [its expiration] in the sense that it continues as a legally operative document" (*id.* at A12). Rather, the court said, "the agreement's terms 'survive' in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations" (*ibid.*). Accordingly, the court found that respondent was entitled to "summary judgment on the trust funds' section 301-based causes of action" (Pet. App. A16), since Section 301 confers jurisdiction on district courts only to enforce rights created by a collective bargaining agreement, and petitioners' suit sought to enforce rights created by the NLRA, not rights created by a collective bargaining agreement (Pet. App. A12-A13, A16).

The court then turned to the question whether the district court had jurisdiction under Sections 502 and 515 of ERISA to enforce respondent's alleged NLRA-based post-contract-expiration contribution obligation (Pet. App.

A16-A31). The court noted that Section 502 confers jurisdiction on the district courts to enforce obligations arising under Section 515 (Pet. App. A17 n.7) and that Section 515 requires an employer " 'who is obligated to make contributions to a multiemployer plan * * * under the terms of a collectively bargained agreement [to] * * * make such contributions in accordance with the terms and conditions of * * * such agreement' " (Pet. App. A16, quoting 29 U.S.C. 1145).[2] The court further noted that "a phrase similar to 'obligated to make contributions,' which appears in section 515, is defined elsewhere in [Section 4212(a) of] ERISA as 'an obligation to contribute arising * * * (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law' " (Pet. App. A21 (quoting 29 U.S.C. 1392(a)), and that "[s]ubpart 2 of this definition would seem to include obligations created by section 8(a)(5)" of the NLRA (*ibid.*). But the court also observed that Section 4212(a)'s definition of "obligation to contribute" is applicable only to the part of ERISA that imposes liability on employers upon withdrawal from multiemployer pension plans (Pet. App. A21-A22),[3] and said that the "similarity

[2] Section 515 of ERISA, 29 U.S.C. 1145, provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

[3] Section 4212(a) of ERISA, 29 U.S.C. 1392(a), provides that:

> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but
>
> does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

between the phraseology in section 515 and that in [the first subpart of the Section 4212(a) definition indicates] * * * that Congress intended section 515 liability to be less extensive than withdrawal liability" (*id.* at A23-A24). And, the court added, there is "[n]o indication * * * that, during its deliberations * * * Congress even considered the problem of continuing obligations from expired agreements much less tha[t] it had a view on resolving any conflict between section 515 and the primary jurisdiction of the NLRB" (*id.* at A25-A26 (footnote omitted)).

In the absence of "useful statutory or Congressional guidance on section 515," the court concluded that the matter had to be decided "by the application of accepted labor law principles" (Pet. App. A31). It then said that, "[w]hen presented with a dispute that involves adjudicating conduct which 'is arguably within the compass of [Section] 7 or [Section] 8 of the NLRA,' a federal court must defer to the primary jurisdiction of the NLRB" (*id.* at A31-A32 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959)). Applying this principle, the court determined that respondent's "failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice" (Pet. App. A33); that "[w]hile admittedly the failure to pay may also violate section 515 of ERISA, adjudication of the merits depends entirely on the section 8(a)(5) determination" (*id.* at A33-A34); and that "[m]aking this underlying labor law determination is exclusively an NLRB matter" (*id.* at A34 (footnote omitted)). Accordingly, having found "no persuasive evidence in either the plain words or legislative history of ERISA * * * that Congress intended section 515 to be an exception to the general rule of NLRB preemption" (*id.* at A35-A36); the court held that "the primary jurisdiction of the [NLRB] preempts [petitioners'] * * * suit in district court under sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after a collective bargaining agreement has expired" (*id.* at A2).[4]

SUMMARY OF ARGUMENT

1. The court below erred in concluding that the district court lacked jurisdiction over petitioners' suit merely because it required resolution of an unfair labor practice question. While the NLRB generally has primary jurisdiction to resolve unfair labor practice questions, Congress has at times granted federal courts jurisdiction over particular claims notwithstanding the need to resolve unfair labor practice questions. See, *e.g.*, *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 258-259 & n.13 (1964); *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626-635 (1975). If, as we contend, Sections 502 and 515 of ERISA confer jurisdiction on the district courts to enforce an employer's contribution obligations based on the employer's NLRA duty to honor the terms of an expired contract, then the fact that the court must resolve an unfair labor practice question is not an obstacle.

2. Sections 502 and 515 of ERISA confer jurisdiction on federal district courts over actions by plan fiduciaries to require, among other things, any "employer who is obligated to make contributions to a multiemployer plan under the terms of * * * a collectively bargained agreement * * * [to] make such contributions * * *" (29 U.S.C. 1145). Standing alone, the phrase "obligated to make contributions * * * under the terms of a collectively bargained agreement" could plausibly be read in either of two ways: it could be read, as the court be-

[4] Three other courts of appeals, following the reasoning of the court below, have reached the same result. See *Moldovan* v. *Great Atlantic & Pacific Tea Co.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds* v. *Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *New Bedford Fishermen's Welfare Fund* v. *Baltic Enterprises, Inc.*, No. 85-1537 (1st Cir. Mar. 11, 1987).

low read it, to refer only to obligations whose legal source is the contract itself; but it can also be read, as we suggest the statutory context requires, to include obligations whose legal source is a public-law duty to honor "the terms of a collectively bargained agreement" in specified circumstances.

The purposes of Section 515 strongly suggest the broader reading. Congress added Section 515 to ERISA in 1980 because delinquent contributions were creating serious financial problems for multiemployer plans and the remedies available for collecting delinquent contributions were inefficient, cumbersome, and costly. Congress enacted Section 515 for the explicit purpose of providing plan trustees, who have a fiduciary duty to collect all contributions owed to a plan, with a single, efficient remedy for the collection of all delinquent contributions, whatever the source of the contribution obligation or the timing of the delinquency. A determination that Section 515, which clearly covers delinquencies during the period of a collective bargaining agreement, does not cover the employer's public-law obligation to continue to honor the terms of the agreement for a period thereafter would defeat the objective with which Congress legislated.

Congress intended Section 515 and the separate provisions of ERISA dealing with withdrawal liability to form an integrated enforcement scheme. Section 4212(a) of ERISA states that, for purposes of the withdrawal liability provisions, the term "obligation to contribute" includes obligations arising "as a result of a duty under applicable labor-management relations law" (29 U.S.C. 1392(a)). While the definition in Section 4212(a) is not technically applicable to Section 515, it is reasonable to conclude that Congress intended that Section 515 and Section 4212(a) would be given the same scope. Applying different definitions to the contribution obligations identified in these provisions would mean that trustees have no independent means for enforcing an em-

ployer's obligation to fund its employees' pensions between the expiration date of the employer's collective bargaining agreement and the date of a new agreement or the employer's withdrawal from the plan. There is no evidence that Congress intended to create such an unwarranted discontinuity in its integrated enforcement scheme.

The alternative to a Section 515 remedy is to require plan trustees to proceed by way of an unfair labor practice charge, which would have to be filed with and prosecuted by the General Counsel of the NLRB. This NLRA enforcement machinery is simply not designed for the efficient collection of all pension fund contributions: the General Counsel of the NLRB has unreviewable discretion to determine whether an unfair labor practice complaint should issue, and she properly exercises that discretion in accordance with her own enforcement priorities; discovery is not available in NLRB proceedings; the General Counsel or the NLRB itself may settle a case without obtaining the consent of the charging party; and, because it cannot impose punitive sanctions, the NLRB has a limited ability to deter employers from becoming delinquent in their contribution payments. In contrast, Section 515 provides trustees with a direct cause of action that they alone control; allows liberal discovery; and requires courts to award attorneys fees and liquidated damages to prevailing trustees.

3. Whatever ambiguity exists in Section 515's coverage cannot be resolved by reference to the general rule that the NLRB has primary jurisdiction to resolve unfair labor practice questions. Reference to the general primary jurisdiction rule only begs the question whether Congress intended, in Section 515, to establish an exception that would allow federal courts to address collateral unfair labor practice questions that arise in a delinquent contribution collection action. That question must be resolved by reference to the language, legislative history, and purposes of Section 515.

ARGUMENT

SECTIONS 502 AND 515 OF ERISA CONFER JURISDICTION ON THE APPROPRIATE DISTRICT COURT TO ENFORCE AN EMPLOYER'S CONTRIBUTION OBLIGATIONS BASED ON THE DUTY UNDER SECTION 8(a)(5) OF THE NLRA TO HONOR THE TERMS OF AN EXPIRED COLLECTIVE BARGAINING AGREEMENT

1. The court of appeals disposed of this case by ruling that, whether or not Section 515 covers the obligation at issue here, "the primary jurisdiction of the [NLRB] preempts [petitioners'] suit in district court under sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after [the] collective bargaining agreement[s] ha[d] expired" (Pet. App. A2). This ruling was error. We agree with the court that "[respondent's] failure to pay contributions after the master agreements' expiration [was], at least, an arguable unfair labor practice" (*id.* at A33) and that "adjudication of the merits [of petitioners' claims] depends entirely on the section 8(a)(5) determination" (*id.* at A43). But it is not the case that "this underlying labor law determination is exclusively an NLRB matter" (*ibid.*).

As a general rule, of course, the NLRA does vest the NLRB with primary jurisdiction to decide unfair labor practice questions. "Congress * * * considered that centralized administration of specially designed procedures was necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid th[o]se diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*Garner* v. *Teamsters Union,* 346 U.S. 485, 490 (1953)). Accordingly, "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the [NLRA]," this Court has said that "the * * * federal courts must defer to the exclusive competence of the [NLRB] * * *" (*San Diego Building Trades Council* v. *Garmon,* 359 U.S. at 245)).

Congress has, however, granted federal courts jurisdiction to decide certain kinds of claims even though the decision requires resolution of an unfair labor practice question. For example, Section 303 of the LMRA (29 U.S.C. 187) provides that anyone injured by a violation of Section 8(b)(4) of the NLRA (29 U.S.C. 158(b)(4)) may recover damages in court; in *Local 20, Teamsters Union v. Morton,* 377 U.S. 252, 258-259 & n.13 (1964), this Court accordingly acknowledged that courts have concurrent jurisdiction with the NLRB to determine whether challenged conduct violates the "prohibitions embodied in [Section] 8(b)(4)." Similarly, Section 301 of the LMRA (29 U.S.C. 185) empowers courts to entertain suits concerning alleged breaches of collective bargaining agreements; in *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 197 (1962), this Court thus said that "[t]he authority of the [NLRB] to deal with an unfair labor practice which also violates a collective bargaining [agreement] is not displaced by [Section] 301 [of the LMRA], but it is not exclusive and does not destroy the jurisdiction of the courts in suits under [Section] 301." And, without exhausting the list of examples, Section 1 of the Sherman Act (15 U.S.C. 1) makes it unlawful to enter into agreements that impose unreasonable restraints of trade; in *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 626-635 (1975), this Court held that therefore, in an anti-trust suit alleging a violation of Section 1 of the Sherman Act, a federal court had jurisdiction to decide whether a challenged collective bargaining agreement was proscribed by the "hot cargo" provisions of Section 8(e) of the NLRA (29 U.S.C. 158(e)) and therefore constituted an unreasonable restraint on trade (in violation of Section 1 of the Sherman Act). See also *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 83-86 (1982) (in suit under Section 502 of ERISA to recover delinquent contributions required by a collective agreement, a federal court has jurisdiction to determine whether the

agreement violates Section 8(e) of the NLRA); *Vaca* v. *Sipes*, 386 U.S. 171, 176-188 (1967) (a federal court may adjudicate duty of fair representation claim in a suit under Section 301 of the LMRA even though the NLRB has concurrent jurisdiction to determine whether the same claim violates Section 8(b) of the NLRA).

These cases show that federal courts may decide unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies" (*Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. at 626). The question in this case is simply whether, in Sections 502 and 515 of ERISA, Congress has created an independent federal remedy for the enforcement of contribution obligations including the obligations at issue here. If so, the district court had jurisdiction to decide the unfair labor practice question that arises in connection with adjudicating these obligations—*i.e.*, whether respondent's failure to pay the contributions in question violated its duty under Section 8 (a)(5) of the NLRA to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining.[5]

2. In our view, Sections 502 and 515 of ERISA do in fact create an independent federal remedy for the enforcement of a contribution obligation arising from the duty under Section 8(a)(5) of the NLRA to refrain from unilaterally changing terms and conditions of employment during post-contract-expiration collective bargaining.

[5] Petitioners do not appear to contend in this Court that either the expired collective bargaining agreements or the pension plan documents require respondent to make such post-contract-expiration contributions. Cf. *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) (arbitration clause extends beyond term of collective bargaining agreement); *Pattern Makers' Pension Trust Fund* v. *Badger Pattern Works*, 615 F. Supp. 792 (N.D. Ill. 1985) (fiduciary may enforce terms of pension plan against employer even though collective bargaining agreement has expired).

a. Section 502(a)(3) of ERISA gives district courts jurisdiction over, inter alia, civil actions by plan fiduciaries to enjoin violations of Title I of ERISA, to redress such violations, and generally to enforce the provisions of Title I. 29 U.S.C. 1132(a)(3). Section 515, which requires employers to make contributions in accordance with their collective bargaining agreements, is part of Title I of ERISA. 29 U.S.C. 1145. The question, therefore, is whether Section 515 covers an employer's obligation under Section 8(a))(5) of the NLRA to continue making contributions to a pension plan, in accordance with the terms of an expired agreement, during post-contract-expiration collective bargaining.

b. We start with the language of Section 515. It states (29 U.S.C. 1145) that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." The key phrase is "obligated to make contributions * * * under the terms of a collectively bargained agreement." That phrase has two plausible readings.

The phrase could be read to refer only to contribution obligations that arise from the collective bargaining agreement itself. See *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F. Supp. 1441, 1444-1446 (W.D. Mo. 1985). On that view, Section 515 would not cover an NLRA-based contribution obligation, since the legal source of that obligation is not the collective bargaining agreement itself, but rather public law. See *Hinson* v. *NLRB*, 428 F.2d 133, 139 (8th Cir. 1970); *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734, 736 (9th Cir. 1981). The phrase can also, however, be read to refer to any contribution obligation that is defined by "*the terms of* a collectively bargained agreement." On that view, Section 515 would cover an NLRA-based contribution obligation, since the extent of the obligation would be defined by the "terms

of a collectively bargained agreement." See *Laborers Health & Welfare Trust Fund* v. *Hess*, 594 F. Supp. 273, 279-280 (N.D. Cal. 1984); see generally *American Distributing Co.* v. *NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984) (emphasis added) (under the NLRA, "an employer is required to maintain the status quo and make payments in conformity with *the terms of an expired written agreement*"); *Hinson* v. *NLRB*, 428 F.2d at 139 (emphasis added) ("[s]ince the status quo is quite obviously defined by reference to the substantive *terms of the expired contract*, it follows that, in a limited and special sense, those pertinent contractual terms 'survive' the expiration date").[6]

In similar circumstances, where more than one interpretation of ERISA's language is plausible, this Court has said that it will " 'look to the provisions of the whole law, and to its object and policy' " (*Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10 (citations omitted)). See generally *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part). Accordingly, to determine whether Congress intended to make NLRA-based contribution obligations independently enforceable in direct, ERISA-based, federal court actions, we turn to the circumstances surrounding Section 515's enactment and the place that Section 515 takes in the overall ERISA scheme.

c. Section 515's legislative history suggests that Congress intended to provide plan trustees with a single, efficient remedy for the collection of all delinquent contributions. Congress enacted Section 515 as part of the Multiemployer Pension Plan Amendments Act of

[6] Raising the power of the linguistic microscope does not help. Congress's use of the phrase "under the terms of * * *," rather than "in accordance with the terms of," might be said to favor the narrower reading. On the other hand, the narrower reading makes the words "the terms of" a mere surplusage.

1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1295. In the MPPAA, Congress attempted to address comprehensively the "problems which tend to discourage the maintenance and growth of multiemployer pension plans" (29 U.S.C. 1001a(c)(2)), and "to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans" (29 U.S.C. 1001a(c)(3)). To that end, Congress revised the system by which the Pension Benefit Guaranty Corporation guarantees benefits to participants in multiemployer plans, mandated that employers withdrawing from multiemployer plans contribute whatever share of the plans' unfunded vested liabilities is attributable to their employees' prior participation in such plans, and created new federal enforcement mechanisms to facilitate the collection of both delinquent contributions and the lump sum liabilities that employers incur upon withdrawal from a plan.[7] See 29 U.S.C. 1132(g)(2), 1145, 1322a-1322b; 29 U.S.C. (& Supp. III) 1381-1461. Section 515 is the enforcement mechanism that Congress created to facilitate the collection of delinquent contributions.

Delinquencies were among "[t]he most significant, and the oldest, day-to-day problem[s] faced by multiemployer plans" (*Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391 (1977) testimony of Theodore Groom) [hereinafter *Hearings on S. 2125*]), and Congress had studied the delinquent contribution problem for some time.[8] During this study,

[7] Neither petitioners nor respondent suggests that respondent has withdrawn from its plans (or incurred any such withdrawal liability).

[8] See, *e.g.*, *Hearings on S. 2125*, 391-394; *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 123 (1978); *Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076*

Congress learned that, where delinquencies occur, plans lose investment income, incur increased administrative expenses (for detecting and collecting delinquencies), have greater difficulty formulating and meeting funding standards, and must require nondelinquent employers to fund the pensions of delinquent employers' employees. See 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 43-44 (Comm. Print 1980) [hereinafter *Comm. Print*].[9] Moreover, Congress found that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)).[10] Thus, those who proposed and supported Section 515's enactment described it as a mechanism that would "permit trustees of plans to recover delinquent contributions efficaciously" (*id.* at 23288 (remarks of Sen. Williams)), "foster the preservation of the private multiemployer plan system * * * [by] discourag[ing] delinquencies and simplify[ing] delinquency collection " (*Comm. Print* 44), and "clarify the law * * * by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)).

Section 515 thus provides a cause of action to collect amounts owed "under the terms of the plan or under the terms of a collectively bargained agreement." The legislative history, while not speaking directly to the present issue, suggests that Congress intended to cover the universe—to provide plan trustees with a single, efficient cause of action for collecting all delinquent contributions. See, *e.g.*, 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 523 (1979) [hereinafter *Senate Hearings on S. 1076*]; *Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 121-122 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 772, 808 (1979) [hereinafter *House Hearings on H.R. 3904*]; *The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 193 (1980).

[9] The Staff of the Senate Committee on Labor and Human Resources explained (*Comm. Print* 43-44) that:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

For additional discussion of the problems that delinquencies cause multiemployer plans, see Note, *Denying The Illegality Defense: An Enigmatic Approach To The Delinquent Pension Fund Contribution Problem*, 34 Stan. L. Rev. 221, 223-228 (1981).

[10] The Staff of the Senate Committee on Labor and Human Resources explained that "[s]ome simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions" (*Comm. Print* 44).

Nothing in the legislative history suggests that Congress attached any importance to the difference between an employer obligated under a live agreement and an employer statutorily bound to honor an expired one, or that Congress intended to require trustees to recover pre-contract-expiration and post-contract-expiration delinquencies in different forums.

d. The argument that the term "obligated to make contributions" in Section 515 should be read to cover contribution obligations arising from the duty under Section 8(a)(5) of the NLRA to refrain from unilaterally changing terms and conditions of employment during post-contract-expiration collective bargaining is reinforced by the definition of a comparable term that appears in the withdrawal liability part of the statute. Section 4212(a) of ERISA states that, for purposes of the withdrawal liability part of the statute, an employer has an "obligation to contribute" when it has "an obligation to contribute arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law * * *" (29 U.S.C. 1392(a)). The second clause of this definition plainly permits arbitrators and courts making withdrawal liability determinations to take into account whether an employer has any contribution obligations arising from its duties under the NLRA. See *Comm. Print* 12-14; *Woodward Sand Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986); *I.A.M. National Pension Trust Fund* v. *Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1289-1296 (N.D. Cal. 1983); *Garland Coal Co.*, 7 Employee Benefits Cas. (BNA) 1771, 1779-1782 (Dreyer, Arb. June 10, 1986). Because the delinquent contribution and withdrawal liability provisions were enacted at the same time and play complementary roles in the MPPAA scheme, it is reasonable to conclude that Congress intended the term "obligated to make contributions," which appears in Section 515, to have a meaning comparable to the term "obligation to contribute," which appears in Section 4212 (a).[11]

The Section 4212(a) definition of the "obligation to contribute" applies only "[f]or purposes of [the withdrawal liability] part" of ERISA (29 U.S.C. 1392(a)) and therefore cannot apply to Section 515 by its "own force" (*Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 370 n.14 (1980)). But the definition in Section 4212(a) "may otherwise reflect the meaning of the term[] defined as used in other Titles" of ERISA (*ibid.*). Here, Congress expressly provided that, for purposes of federal court enforcement, the delinquent contribution and withdrawal liability provisions should be "treated in the same manner" (29 U.S.C. 1451(b); see also 29 U.S.C. 1401(d)) and indicated that the two provisions addressed complementary aspects of the same legislative concern. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.* at 23039 (remarks of Rep. Thompson); *id.* at 20180 (colloquy between Sen. Williams and Sen. Matsunaga). Accordingly, the question whether an employer has a contribution obligation arising from an NLRA-based duty should be equally adjudicable by courts under Sections 515 and 4212(a) of

[11] The legislative history of the two provisions neither confirms nor refutes the point. The withdrawal liability provisions were introduced simultaneously in both houses of Congress on May 3, 1979. See H.R. 3904, 96th Cong., 1st Sess. (1979), *reprinted in House Hearings on H.R. 3904*, at 3; S. 1076, 96th Cong., 1st Sess. (1979), *reprinted in Senate Hearings on S. 1076*, at 3. Neither bill contained a provision concerning delinquent employer contributions. See S. 1076, 96th Cong., 1st Sess. (1979); H.R. 3904, *supra*. The provision for delinquent contributions was added later by floor leaders in both houses. 126 Cong. Rec. 23039 (1980); *id.* at 23288. The legislative history does not directly discuss the connection between the delinquent contribution and withdrawal liability provisions, except to state that they should be enforced in the same manner. See *House Hearings on H.R. 3904*, at 808; 126 Cong. Rec. 23039 (1980); *id.* at 23288-23289.

ERISA.[12] See *Woodward Sand Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986); *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983); cf. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973) (the similarity of language in two statutory provisions is "a strong indication that the two statutes should be interpreted *pari passu*").

Moreover, the delinquent contribution and withdrawal liability provisions form an integrated scheme under which plan trustees may use federal law to require employers to fulfill their promises to fund pensions for their employees. The delinquent contribution provisions ensure that, when an employer has become "obligated to make contributions," it "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan * * *" (29 U.S.C. 1145). The withdrawal liability provisions ensure that, when an employer "withdraws from a multiemployer plan in a complete withdrawal * * * the employer [shall be] liable to the plan" for a portion of the plan's unfunded vested benefits, such that the burden of its employees' pensions will not fall on the remaining employers or plan beneficiaries. 29 U.S.C. 1381(a)(1).[13] Together, the two

[12] Congress clearly intended trustees, arbitrators, and courts to make impasse determinations when necessary to assess and collect withdrawal liability, despite a potential inroad on the traditional primary jurisdiction of the NLRB. No greater inroad will result if such determinations are made by trustees and courts in actions under Section 515.

[13] The statute provides that a "complete withdrawal" occurs only when an employer "permanently ceases to have an obligation to contribute under the plan" (29 U.S.C. 1383(a)(1)). An employer cannot, however, prevent a complete withdrawal from occurring by becoming delinquent in paying contributions to the plan; Section 4212(a) provides that, for purposes of determining withdrawal liability, the term "obligation to contribute" "does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions" (29 U.S.C. 1392(a)).

provisions ensure that an employer's obligation to fund its employees' pensions is fully enforceable under ERISA with respect to the entire period for which the employer's employees will have claims against the multiemployer plan. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.* at 23039 (remarks of Rep. Thompson); *id.* at 20180 (colloquy between Sen. Williams and Sen. Matsunaga).

Applying different definitions to the contribution obligations identified in the delinquent contribution and withdrawal liability provisions would create an unwarranted discontinuity in this integrated enforcement machinery. ERISA would provide plan trustees with an independent means for enforcing an employer's obligations arising (i) during the term of the underlying agreement and (ii) upon withdrawal from the plan.[14] But, if the phrase "obligated to contribute" in Section 515 does not mean the same thing as the phrase "obligation

[14] The parties' continuing but unsuccessful attempts to negotiate an agreement may constitute a "labor dispute" and, if so, the suspension of contributions by the employer would not give rise to withdrawal liability. See 29 U.S.C. 1398(2); *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y.), aff'd, 735 F.2d 60 (2d Cir. 1984). Though the plan trustees may seek retroactive withdrawal liability once the employer is finally found to have withdrawn from the plan (PBGC Op. Letter 86-4 (Feb. 28, 1986)), they would not be able to do so if the parties ultimately resolved their labor dispute and, in doing so, provided that the employer shall continue to participate in the plan. Whether continued participation in the plan includes full payment of delinquent contributions may depend upon either the terms of the plan itself or the union's ability to secure the employer's agreement to pay such contributions. See *Southwest Administrators, Inc.* v. *Rozay's Transfer*, 791 F.2d 769, 771 & n.1 (9th Cir. 1986). Of course, the expense involved in paying delinquent contributions may itself be a factor in the negotiations.

to contribute" in Section 4212(a), ERISA would not provide plan trustees with any means for enforcing an employer's obligations with respect to the period between the expiration of the collective bargaining agreement and the date of a new agreement or the employer's withdrawal from the plan, even though the employer would have such an obligation, and even though ERISA would require plan trustees to credit all employee service performed during that period, whether the contributions are ultimately recovered or not.[15]

Such a discontinuity in the statutory enforcement machinery would be quite important. Collective bargaining agreements typically have only two-to-three year terms, and employees often continue working (and negotiators continue bargaining) beyond the expiration dates of those agreements. Delinquencies in the payment of contributions during this period are a routine and burdensome problem for multiemployer pension plans. We find no evidence that Congress intended to leave such a discontinuity in the otherwise "comprehensive and reticulated" scheme (*Nachman Corp.* v. *Pension Benefit Guaranty*

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[15] 29 U.S.C. 1053(b)(1)(G) states that "all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account." See also 29 U.S.C. 1052(b)(1), 1054(b)(3)(A); 29 C.F.R. 2530.210(c)(2). The Department of Labor has interpreted this provision as requiring that credit "be given solely on the basis of service performed for [a participating employer], regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions." Dep't of Labor Advisory Op. 76-89 (Aug. 31, 1976), *reprinted in* Pens. Rep. (BNA) No. 221, at R-25 (Jan. 8, 1979). See also Dep't of Labor Advisory Op. 78-28A (Dec. 5, 1978), *reprinted in* Pens. Rep. (BNA) No. 221, at R24-R25 (Jan. 8, 1979). Similarly, the Internal Revenue Service has stated that a "multiemployer plan must credit all years of service of employees as long as the employer is obligated to contribute to the plan on behalf of such service." IRS Gen. Couns. Mem. 39,048 (Nov. 2, 1983), *reprinted in* 10 Pens. Rep. (BNA) 1764, 1765 (1983).

Corp., 446 U.S. 359, 361 (1980)) that it enacted specifically to address the many "problems which tend to discourage the maintenance and growth of multiemployer pension plans" and to "provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans" (29 U.S.C. 1001a(c)(2) and (3)).

3. If plan trustees are not able to recover post-contract-expiration delinquent contributions in suits under Section 515, their only alternative is to file an unfair labor practice charge with the NLRB. That remedy is not suited to this purpose. ERISA imposes strict fiduciary duties of loyalty and care on plan trustees[16] and specifically deems plan trustees to have violated these duties if they allow participating employers to gain even temporary use of funds to which their plan is entitled.[17] This Court

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[16] Under the duty of loyalty, a plan fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries; and * * * defraying reasonable expenses of administering the plan" (29 U.S.C. 1104(a)(1)(A)). Under the duty of care, a fiduciary "shall discharge his duties with respect to a plan * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. 1104(a)(1)(B)).

[17] 29 U.S.C. 1106(a)(1)(B) states that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect * * * lending of money or other extension of credit between the plan and a party in interest." The Secretary of Labor has long interpreted this provision to require trustees to "establish and implement collection procedures which are reasonable, diligent, and systematic" (Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976)). This Court has cited that interpretation with approval. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 567 n.7 (1985).

has accordingly stated that "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled" and that trustees are "responsibl[e] for assuring full and prompt collection of contributions owed to the plan" (*Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 571, 573 (1985)). Interpreting Section 515 to require trustees to resort to NLRA enforcement remedies for the collection of post-contract-expiration delinquencies would greatly impede the ability of plan trustees to carry out these fiduciary tasks.

The NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the collection of delinquent contributions. The NLRA, for example, vests the NLRB's General Counsel with "unreviewable discretion to refuse to institute an unfair labor practice complaint" (*Vaca* v. *Sipes*, 386 U.S. at 182) and, in exercising her discretion, the General Counsel is guided by numerous practical considerations—such as the seriousness of the offense and the likelihood of its repetition, and the government resources available for prosecution—as well as the merits of the charge. See *Roselle Shoe Corp.*, 135 N.L.R.B. 472, 475 (1962), enforced *sub nom. Textile Workers Union* v. *NLRB*, 315 F.2d 41 (D.C. Cir. 1963); see also *Container Systems Corp.* v. *NLRB*, 521 F.2d 1166, 1171-1172 (2d Cir. 1975). Thus, requiring plan trustees to resort to the NLRB may, in limited circumstances, mean that they have no recourse for collecting delinquencies notwithstanding the merits of their charge. Furthermore, even where the General Counsel issues an unfair labor practice complaint, the NLRB does not allow interested persons to obtain discovery. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-242 (1978). The denial of discovery may be particularly detrimental to third parties such as trustees, who do not directly participate in collective bargaining negotiations and whose interest in collecting delinquent contributions

may not align precisely with interests of either the employer or the union.[18] Moreover, the NLRA authorizes the General Counsel and the NLRB to settle unfair labor practice charges without obtaining the charging party's consent and for less than "make-whole" relief (see 29 U.S.C. 160(c); 29 C.F.R. 101.2, 101.4, 101.9(c)); thus, the trustees' interest in fully collecting all contributions owed to a pension plan may be compromised without their consent.[19] Finally, the NLRB cannot impose any type of punitive sanction and thus has only a limited ability to deter employers from becoming delinquent in the first place. See *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould*, No. 84-1484 (Feb 26, 1986), slip op. 5-6 & n.5; *Hassett Maintenance Corp.*, 260 N.L.R.B. 1211 (1982).

In contrast, the ERISA enforcement scheme is specially designed to "foster the preservation of the private

[18] The union's interest in obtaining a favorable contract may outweigh its interest in insuring that all delinquent contributions are paid. The union may therefore be unwilling to initiate proceedings before the NLRB, to assist the trustees in doing so, or to pressure the employer to fulfill its obligations to employee benefit plans. See generally *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 334-338 (1981); *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-175 (1971); *Central States Southeast & Southwest Areas Pension Fund* v. *Kraftco, Inc.*, 799 F.2d 1098, 1100-1102 (6th Cir. 1986), cert. denied, No. 86-881 (Feb. 23, 1987). Accordingly, this Court has repeatedly rejected arguments that trustees can or should rely on unions to collect delinquent pension fund contributions. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. at 575-577; *Schneider Moving & Storage Co.* v. *Robbins*, 466 U.S. 364, 373-376 (1984).

[19] In 1986, the NLRB settled 91.7% of all "meritorious" unfair labor practice cases. See NLRB General Counsel's Report Summarizing Operations In Fiscal 1986, Daily Labor Rep. (BNA) D-2 (Feb. 27, 1987). Such settlements do not necessarily result in full recovery of delinquent contributions by plans. See *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F. Supp. 1441 (W.D. Mo. 1985).

multiemployer plan system * * * [by] discourag[ing] delinquencies and simplify[ing] delinquency collection" (*Comm. Print* 44). Section 515 provides trustees with a direct, unambiguous cause of action for collecting delinquencies. The trustees have control over the action and no third party can compromise their interest in collecting all contributions owed to a plan. Moreover, liberal rules of discovery govern the action and provide trustees with a means for determining whether and to what extent contributions are actually owing and delinquent. Finally, Section 502(g)(2) of ERISA *requires* courts, where trustees are victorious, to award reasonable attorney's fees, costs, unpaid contributions, interest on the unpaid contributions, and an additional amount equal to the greater of interest or specified liquidated damages. See 29 U.S.C. 1132(g)(2). Thus, the ERISA enforcement scheme adds some important muscle to the trustees' struggle against delinquent contributors and delinquent contributions.

When Congress added Section 515 to ERISA's enforcement scheme, it stated that "[r]ecourse available under current law for collecting delinquent contributions [was] insufficient and unnecessarily cumbersome and costly" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)). NLRB enforcement proceedings were part of the then-available recourse. Accordingly, Congress could not have intended to require plan trustees to rely solely on the NLRB for enforcement of NLRA-based contribution obligations. Rather, since it viewed "[t]he civil enforcement scheme of § 502(a) as one of the essential tools for accomplishing the stated purposes of ERISA" (*Pilot Life Ins. Co.* v. *Dedeaux*, slip op. at 11-12), Congress must have presumed that Section 515 would cover these obligations as well.

4. Although its opinion is not altogether clear on the point (compare Pet. App. A21-A26 with A26 n.12 and A33-A34), the court below acknowledged that "the failure to pay may also violate section 515 of ERISA" (*id.* at A33). It found, however, that the language and legislative history of Section 515 are sufficiently ambiguous to require that its interpretation be resolved by reference to "accepted labor law principles," specifically, the principle that the NLRB has primary jurisdiction to resolve unfair labor practice questions. See Pet. App. A31-A32. We do not think that the question of Congress's intent under Section 515 can be resolved in this fashion.

As noted earlier, the NLRA vests the NLRB with primary jurisdiction over unfair labor practice questions to ensure that the statute is uniformly and consistently interpreted. As also noted earlier, however, Congress has occasionally determined that this concern for uniformity of decision should yield to other considerations and, in such situations, has established independent mechanisms for enforcing particular NLRA-based rights. See *Local 20, Teamsters Union* v. *Morton*, 377 U.S. at 258-259 & n.13; *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. at 626-635. The question whether Congress intends any particular NLRA-based right to be enforceable by an independent mechanism (and thus to create a particular exception to the general primary jurisdiction rule) obviously cannot be answered by reference to the general primary jurisdiction rule itself; reference to the general primary jurisdiction rule only begs the question whether Congress intended to establish an exception to it. The question whether Congress intended to establish an exception to the general primary jurisdiction rule, or, stated differently, to create an additional remedy for the violation of an NLRA-based right, can be answered only by reference to the language, legislative history, and purposes of the federal statute alleged to establish the exception or to create the additional remedy—in this instance, Section 515 of ERISA. Any ambiguity in the meaning of this statute—as with

the ambiguity in the meaning of any other statute—must be resolved on its own terms.[20]

[20] Although we see no obstacle to a court determining, in a case properly brought under Sections 502 and 515, whether an employer improperly ceased making contributions to a fund prior to reaching impasse in negotiations, deference to the NLRB's judgment of whether and when impasse occurred is nevertheless preferable where an NLRB judgmnt will be forthcoming. See *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 413 (1982); see also *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 533-534 (1984). If the General Counsel has issued a complaint concerning a bad faith bargaining charge filed by either the trustees of a plan or a union, a federal court concurrently considering a Section 515 enforcement action by trustees should refrain from deciding any "impasse" question and await that issue's resolution by the NLRB. See *Northern California District Council of Hod Carriers* v. *Opinski*, 673 F.2d 1074 (9th Cir. 1982); *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 515 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983). The NLRB decision should be binding in the trustees' federal court action, provided that the trustees had an adequate opportunity to litigate the issue in the NLRB proceedings. See *Moldovan* v. *Great Atlantic & Pacific Tea Co.*, 790 F.2d 894, 899 (3d Cir. 1986); see generally *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 272 (1964); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966).

Here, the Regional Counsel of the NLRB refused to issue a complaint with respect to the union's bad faith bargaining charge. Pet. App. A5 n.1. Accordingly, the district court had no reason to defer its resolution of the "impasse" question.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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